THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

- -X

J. EDWIN LA VALLEE, Superintendent, Clinton Correctional Facility,

Petitioner,

-against-

UNITED STATES OF AMERICA, ex rel. THOMAS MUNGO,

Respondent.

- -X

75-696

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THOMAS MUNGO IN OPPOSITION

DAVID W. McCARTHY
McCARTHY and DORFMAN
Attorney for Respondent
1527 Franklin Avenue
Suite 310
Mineola, New York 11501
(516) 746-1616

THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

- -X

J. EDWIN LA VALLEE, Superintendent, Clinton Correctional Facility,

Petitioner,

-against-

UNITED STATES OF AMERICA, ex rel. THOMAS MUNGO,

Respondent.

- -X

75-696

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THOMAS MUNGO IN OPPOSITION

1a. The petitioner contends that certiorari should be granted to determine whether Federal habeas corpus (28 U.S.C. 2254) is a proper vehicle to test alleged Fourth Amendment violations by State authorities.

Although this Court has granted certiorari in Wolff v. Rice, 513 F 2d 1280, (8th Cir. 1975) cert. granted _____U.S._____ 44 L. W. 3010 (March, 1975), docket number 75-2019, on a somewhat analogous issue, the question as posed

by the petitioner had not been presented in any form to the Second Circuit Court of Appeals (see appendix "A"). The issues argued by the State focused upon whether the identification confrontation herein was a denial of due process; whether the arrest of respondent was upon probable cause and whether the respondent had exhausted state remedies regarding "fruit of the poisonous tree" argument. At no time did the state raise the appropriateness of federal habeas corpus with respect to the constitutionality of the arrest of respondent.

The record herein reveals that the State waived this issue not simply by neglect or reliance upon settled principles of law, but by affirmative decision constituting abandonment. In its memorandum submitted to the District Court, New York, argued as in this petition viz. that respondent should not be permitted to litigate the Fourth Amendment contentions involved herein, citing Schneckloth v. Bastamonte, 36 L. Ed. 2d 854, 876, 889 (see page 6 of appendix "B"). The conclusion is inescapable, therefore, that although aware of the argument, the State declined to present the issue to the Second Circuit and, instead, opted to press only the three issues stated above.

In Adickes v. Kress and Co., 398 U.S. 144; 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), the petitioner asserted that respondent had violated her constitutional rights under the Equal Protection Clause and sought damages pursuant to 42 U.S.C. §1983. During the pendency of the case in the District Court, the petitioner moved to amend the complaint by adding a count seeking liquidated damages under §1 and 2 of the Civil Rights Act of 1875. The motion was denied and the denial was not raised as an issue on appeal to the Second Circuit. This Court refused to consider the issue stating:

> "Where issues are neither raised nor considered by the Court of Appeals, this Court will ordinarily not consider them. Lawn v. United States, 355 U.S. 339, 362-363, n. 16, 2 L. Ed. 2d 321, 337, 78 S. Ct. 311 (1958); Hurtz v. United States, 282 U.S. 694, 701-702, 75 L. Ed. 629, 632, 633, 51 S. Ct. 240 (1931); Duignan v. United States, 274 U.S. 195, 200, 71 L. Ed. 996, 1001, 47 S. Ct. 566 (1927)." 398 U.S. 147, ftnt. 2.

Similarly, here the issue has been waived.

b. Aside from the question of waiver, this case is simply not appropriate for reconsideration of the long established precedent permitting the adjudication of Fourth Amendment issues pursuant to 28 U.S.C. section 2254. Mr. Justice Powell's opinion in Schneckloth v. Bustamonte, 412

U.S. 218 (1973) focused upon the inappropriateness of this remedy for a Fourth Amendment issue only when unencumbered by issues of guilt or innocence. Mr. Justice Powell stated:

> Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. 412 U.S. at p. 266.

The recognition of the invalidity of the instant arrest by the Second Circuit served, not merely to apply "mechanistic" legal principles, but to rectify the unfortunate consequences of an unnecessarily suggestive showup.* In short, this Fourth Amendment claim concomitantly raised the question of respondent's innocence with respect to the

---

* We recognize, as we must, that this argument does not apply with equal force to the conviction upon possession of weapons. However, even there, the guns were seized in the car in which other persons as well were located, not from the respondent's person. And to reverse as to that case alone would contradict the need of judicial economy, one of the reasons asserted for limiting federal habeas review application would of necessity, be made for reargument to the New York Court of Appeals pursuant to §500.9 (b) of the Rules of the Court of Appeals. In light of People v. Lypka, infra, the previous decision of the Court must be vacated and respondent's conviction reversed.

robbery charge.* Therefore, as applied to the respondent herein, his constitutional claim "bears on innocence" and is a proper subject for federal habeas corpus within the meaning of Mr. Justice Powell's concurring opinion in Schneckloth v. Bustamonte, supra.

2a. The petitioner also contends that the Second Circuit was mistaken in holding that probable cause was not established.

Apparently, New York is suggesting that this Court ought to reconsider its decisions and to create a presumption that anonymous informers are, ipso facto, reliable and further presume that information provided by informants are

---

*Although the contention that respondent was identified in an unnecessarily suggestive identification confrontation violating the Due Process clause was raised before the Second Circuit, it was not decided inasmuch as the Court ruled the station house identification was an exploitation of the invalid arrest. The complainant, Mr. Monteleone was unable to make an identification until one of the hats seized from the automobile was placed upon respondent's head. (See Petitioner's appendix A, p. 12).

presumptively based upon personal knowledge or has some other reliable basis. Clearly, this has never been the law. Aguilar v. Texas, 378 U.S. 108 (1965); Spinelli v. United States, 393 U.S. 410; McCraiy v. Illinois, 386 U.S. 300, (1967); Whiteley v. Warden, 401 U.S. 560, (1971).

Moreover, no reason is offered by the State for reconsideration which has not been previously considered by this Court and rejected.

Significantly, the petitioner adopts the conclusion of the District Court, that the source of the radio run, although unknown, must have been an eyewitness. But the Second Circuit noted:

> The record yields nothing to identify who made the report,much less the presence of any competent person who observed the theft of the United Parcel Service truck. Petition appendix A p. 5a.

Furthermore, the argument that the police apprehended the persons in the car which matched the description transmitted on the police radio is irrelevant. In fact the observations of the police officer after the radio run negated, contrary to petitioner's contention, that the vehicle was in flight. Not only did the vehicle proceed at the

legal rate of speed, but stopped at the red light and the occupants followed the police instruction to a light therefrom. In short, this Court's statement in Whiteley v. Warden, supra, regarding the identical argument made therein is conclusive here:

> This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone. Draper v. United States, 358 U.S. 307, 3 L.Ed. 2d 327, 79 S. Ct. 329 (1969). See Spinelli v. United States, supra, at 423, 21 L. Ed. 2d at 647. But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in Draper itself, were in the process of committing the felony. (emphasis added) (401 U.S. 567).

Here, the police observation only verified that men were in a car. There is simply nothing, much less a violation of traffic laws or failure to respond to a lawful direction of a police officer or a false statement as in Whiteley, 401 U.S. at 567 which would corroborate that respondent participated in the larceny.*

*Petitioner's allegation that the police officer believed guns were involved in the theft of the U.P.S. truck is unfounded. No evidence supports this contention. Even the radio men only refers to the offense as a "larceny of a truck." (Footnote continued on page 8).

2b. Not only is the petitioner's position herein without merit based upon Whiteley, but also by virtue of the adoption, by the Court of Appeals of New York, of this Court's reasoning in Whiteley. In People v. Lypka, 36 N.Y. 2d 210 (1975) the Undersheriff of Seneca County, New York, received a telephone call from a Detective Holhman of the Pennsylvania Police Department. Detective Holhman recited that the two defendants who were in possession of various weapons and stolen property were driving in a vehicle described by type, color, and license plate number to Seneca County. The source of the detective's information was not disclosed by him. After the Undersheriff was informed of the defendants' arrival, nine or ten sheriff deputies and state troopers travelled to the house where they were located. The vehicles previously described were parked in front of the house, and when Lypka denied any knowledge of contraband, they were unlocked (by the Lypkas) and a search conducted.

Footnote continued from page 7.
That guns were involved implies that "larceny" has now been distorted to mean "robbery" or that police officers, speculatively, assume all thefts involve guns.

The immediate search and one which occurred later revealed weapons and stolen property. In the court of first instance, the County Court, a motion to suppress was denied, finding a consensual search. A majority of the Appellate Division found probable cause and a valid search within the long-established automobile exception to the requirement that a warrant be obtained.

In deviating from the analyses of the lower courts, Judge Jasen, speaking for a unanimous Court, focused upon the source of the information, i.e. whether Detective Holhman was possessed of probable cause to conduct a search. Citing Whiteley, the Court noted the propriety of relying upon the interstate communication from Pennsylvania. But, again citing Whiteley, the Court noted that a challenge to the legality of the arrest, by way of a motion to suppress removes the initial apparent probable cause and requires fulfullment of the traditional requirements of probable cause, including establishing the reliability of the information and informant.

The Court further stated, apropos proving probable cause:

> At that point, bare reliance on an unsubstantiated hearsay communication from the instigating officer or department will not suffice for probable cause. Ultimately, to sustain their burden at the suppression hearing (see People v. Green, 33 N.Y. 2d 496, 500, n. 2 354 N.Y.S. 2d 933, 939, 310 N.E. 2d 533, 535), the People must demonstrate that the sender or sending agency itself possessed the requisite probable cause to act. (citations omitted)

The Court remanded for a further hearing as to whether the Pennsylvania authorities, as is required to satisfy the Fourth Amendment, had probable cause. But, on the state of the record then before the Court, no probable cause had been established, since there was no proof that Detective Holhman had probable cause. Clearly, therefore, this Court's decision in Whiteley, which was decided after the respondent had exhausted his State remedies, has been found persuasive by the highest Court of this State. Consequently, not only do the precedents of this Court uphold the respondent's position, but it has been vindicated, finally and by a unanimous court, in New York.

To grant certiorari on this issue, it is submitted, serves only to provide the opportunity to confuse principles which have been long established, and to reject cogent reasoning which has been recognized for its validity.

It is therefore, respectfully submitted that the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

DAVID W. McCARTHY, ESQ.
McCARTHY and DORFMAN
Attorneys for Respondent
1527 Franklin Avenue
Suite 310
Mineola, New York 11501
(516) 746-1616